FILED
JUN 7 1967
JOHN DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 150

1967

DECLA FISHER, SR., *Petitioner,*

v.

STATE OF ARKANSAS, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

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STATE OF ARKANSAS, _____ *Respondent*

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OPINION BELOW

The opinion below of the Arkansas Supreme Court appears as Deola Fisher, Sr. v. State of Arkansas, 241 Ark. 545 (December 5, 1966). The petition for rehearing was denied by the Supreme Court of Arkansas on January 16, 1967.

JURISDICTION

The petitioner has alleged jurisdiction under 28 U.S.C. §1257 (3). Respondent submits that this Court should not take jurisdiction in this matter for the reasons pointed out in respondent's argument.

STATEMENT OF THE CASE

Although not in issue here, a brief review of the legal history of this litigation is extremely beneficial and should aid in the consideration of petitioner's application for certiorari.

An information was filed against the petitioner, Deola Fisher, Sr., on November 8, 1965, charging him with first degree murder in that the defendant on the 5th day of November, 1965, did unlawfully, feloniously, with deliberation and premeditation wilfully and maliciously shoot, kill and murder Peter Collier by shooting him with a pistol. On November 10, 1965, appellant was arraigned, entered his plea of not guilty and bail was set in the amount of ten thousand dollars. Thereafter bail was reduced to the sum of five thousand dollars. The defendant was tried on the 14th day of February, 1966, and the jury returned a verdict of guilty of murder in the second degree and fixed his punishment at 15 years in the penitentiary. Judgment was entered on the 21st day of February, 1966, sentencing the defendant to a term of 15 years in the State Penitentiary. In due time a motion for new trial was filed. The motion for new trial was overruled and the case was appealed to the Supreme Court of Arkansas. From the decision of the Supreme Court of Arkansas affirming the conviction this petition for writ of certiorari arises.

The issues noted in the petition for writ of certiorari are identical to those presented to the Supreme Court of the State of Arkansas, and these three issues were briefed and decided by the Supreme Court of the State of Arkansas.

The petitioner raises one issue in this petition for writ of certorari which is based on three instances which occurred during the course of the trial. The issue raised is whether or not petitioner received a fair trial pursuant to the Constitution of the United States and more specifically to the Fourteenth Amendment to the Constitution of the United States.

The three questions raised in support of petitioner's contention are:

1. Whether the Court erred in permitting Police Chief James Steed to testify over defendant's objection to statements made by the defendant after his arrest without advising the accused of his constitutional rights to remain silent and to have an attorney;

2. Whether the Court erred in permitting former County Judge Charles O. Smithers, employer of the deceased, to remain seated immediately behind the witness box during the time the witnesses were testifying after Judge Smithers had expressed his opinion of the character of the petitioner and his guilt;

3. Whether the notation by the prosecuting attorney and his deputy of the deceased's and petitioner's race, both were Negroes, prevented the petitioner a fair and impartial trial without prejudice.

ARGUMENT

I

The petitioner was afforded a fair and impartial trial which was conducted pursuant to the Constitution of the United States and more specifically pursuant to the Fourteenth Amendment to the Constitution of the United States. Petitioner was afforded due process of law.

For simplicity respondent's argument on this point is divided into three different categories in accordance with the order of the petitioner's brief.

(a) *The petitioner was not denied due process of law when the court permitted Police Chief James Steed to testify to statements made spontaneously before petitioner was advised of his constitutional rights to remain silent and to have an attorney.*

The trial Court permitted Police Chief James Steed to testify to a statement made by the defendant at the time of his arrest. Petitioner argues that this testimony should not have been permitted because the defendant had not previously been warned of his right to remain silent and of his right to retain counsel. In support of this proposition the petitioner relies on *Escobedo* v. *Illinois,* 378 U.S. 478 (1964).

Police Chief James Steed testified that he asked the petitioner why he had killed the deceased, and the petitioner promptly replied that he (deceased) needed killing. In the petitioner's petition for writ of certiorari he does not allege any force, promise or persuasion was used to induce him to talk but simply states that this statement

should not be admitted because petitioner was not first advised of his constitutional rights to remain silent and to be represented by an attorney. Respondent agrees with the Supreme Court of the State of Arkansas that this was a spontaneous admission of guilt by petitioner in that the Police Chief only asked a question to which the petitioner spontaneously replied shortly after the arrest.

In any event, petitioner is incorrect in relying on the case of *Escobedo* v. *Illinois, supra,* or *Miranda* v. *United States,* 384 U.S. 436 (1966), as being applicable because these decisions do not apply to cases tried before June 13, 1966, according to *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). The instant case was tried in February of 1966; therefore, it is respondent's contention that the only requirement was that the admission had been made voluntarily and not as a result of coercion. The record demonstrates beyond doubt that the confession was voluntarily and spontaneously made, and therefore the petitioner was not denied due process of law under the Fourteenth Amendment to the United States Constitution.

(b) *The petitioner was not denied due process of law under the Fourteenth Amendment to the United States Constitution when the court permitted former County Judge Charles O. Smithers, employer of the deceased, to remain seated in the section ordinarily reserved for lawyers, the defendant, the judge, the jury and court officials.*

Petitioner makes no attempt to show any actual or suspected prejudice arose against him by allowing Charles O. Smithers to sit in the area ordinarily reserved for the lawyers, the defendant, the judge, the jury and court

officials in his petition for writ of certiorari. It was established in chambers but not in the presence of the jury that Charles O. Smithers had an opinion about the case but petitioner does not at any point suggest that Judge Smithers ever expressed this opinion in the presence of the jury, and therefore no statement that he made during the course of the trial out of the hearing of the jury could in any way prejudice the petitioner. Petitioner cites *Sheppard* v. *Maxwell,* 86 S.Ct. 1507 (1966) as authority for this contention. The *Sheppard case* is easily distinguishable in that the presence of the spectators was prejudicial to Sheppard, and in the instant case there is no allegation of prejudice to the petitioner. It is clear that the trial was conducted fairly in a public tribunal free of prejudice, passion, excitement and tyrannical power pursuant to *Chambers* v. *State of Florida,* 309 U.S. 227 (1940), and that Charles O. Smithers' presence in no way affected the trial. In fact, it was not known that Charles O. Smithers would be a witness until he was called by the State to testify.

Petitioner was not denied due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States because of Charles O. Smithers' presence.

(c) *The petitioner was not denied a fair trial and due process of law under the Fourteenth Amendment to the Constitution of the United States when the race of the petitioner was mentioned on voir dire by the prosecuting attorney and in the closing argument by the deputy prosecuting attorney.*

During the voir dire (T.65-68) the prosecuting attorney asked a prospective juror if he felt that members of the colored race should answer to the law just the

same as the white race and if the jurors thought race should enter into it. Clearly a question of this sort points out that the prosecuting attorney was attempting to comply with the Constitutions of the United States and of the State of Arkansas by eliminating prejudice on the part of any juror. It appears to respondent that this information would tend to help and not hurt the petitioner because the jury was certain to know he was of the Negro race. Petitioner's argument not only assumes without foundation that the jury was prejudiced by the remarks but it contends the incredible premise that the jury, without the comments, would have remained ignorant during the full course of this lengthy trial of the fact that the deceased and the petitioner were both Negroes. The petitioner does not claim that the jury was biased or prejudiced or that it was chosen in violation of his constitutional rights but only alleges that this question that was intended to assure a prejudice-free trial denied the petitioner a fair trial.

Respondent contends that this question assured a fair and impartial trial, and therefore petitioner was not denied due process of law under the Fourteenth Amendment to the Constitution to the United States by the respondent's question.

Further, the petitioner alleges that the remarks of the deputy prosecuting attorney during closing argument concerning the fact that there had never, in the history of Saline County, been a Negro convicted and sentenced to life imprisonment was prejudicial to the petitioner and in violation of due process of law. It is well settled that the trial judge is vested with wide discretion in determining the propriety of counsel's remarks to the jury. *Green* v. *State*, 38 Ark. 304 (1881); *Head* v. *State*, 221 Ark. 213, 252 S.W. 2d 617 (1952). It is obvious that

the statement had no bearing on the jury because the petitioner was convicted of second degree murder and sentenced to 15 years. This comment was not made to prejudice the minds of the jurors and prevent the petitioner a fair and impartial trial, and it is the contention of the respondent that no prejudice arose from the statement as shown by the jury's verdict and further it is respondent's position that the statement is constitutionally permissible. The petitioner was not denied due process of law by the statement of the deputy prosecuting attorney in his closing argument.

CONCLUSION

It is submitted that the issue raised by the petitioner in his petition for writ of certiorari is totally without merit for the foregoing reasons and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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